Editor's note: Reconsideration denied by order dated April 5, 1973

PHIL HILLBERRY

IBLA 72-20 Decided December 21, 1972

Appeal from decision (Wyoming 1-70-2) by Administrative Law Judge Dent D. Dalby dismissing an appeal from the denial of requests for a readjudication of base property qualifications and authorization of additional grazing use, and for a partial reimbursement for a fence constructed on public land.

Affirmed.

Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Hearing Examiner

> Where pursuant to cooperative agreements for the construction of a fence on public land between appellant's and another's allotments and where all the parties have complied with the terms of the cooperative agreements, a request for partial reimbursement of costs on an equal basis may not be considered, because such issues were resolved in an earlier contract and it is essentially a dispute, if any, between private parties; and neither an Administrative Law Judge nor the Board of Land Appeals has authority to direct payment of compensation.

Grazing Permits and License: Adjudication -- Grazing Permits and Licenses: Appeals -- Grazing Permits and Licenses: Base Property (Land): Generally

> Where appellant's grazing privileges were adjudicated in 1964, which he accepted by signing an agreement specifying his grazing use and where between 1964 and 1970 he applied for grazing use in accordance with that adjudication and was licensed accordingly, appellant lost his right to appeal through failure to protest or appeal the adjudicatory decision of 1964. 43 CFR 4.470(b), formerly 43 CFR 1853.1(b).

Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Base Property (Land): Generally

Under the provisions of 43 CFR 4115.2-1(e)(9) a grazing licensee or permittee is precluded from seeking to increase his base property qualifications, where, for two or more consecutive years subsequent to the adjudication of his grazing privileges, he has filed applications for only those qualifications determined by the adjudicatory decision.

Grazing Permits and Licenses: Generally -- Grazing Permits and Licenses: Adjudication -- Grazing Permits and Licenses: Base Property (Land): Generally

Under the provisions of 43 CFR 4115.2-1(e)(13)(i) a grazing licensee or permittee is precluded from questioning base property qualifications which have been recognized and licenses have issued for more than three consecutive years.

APPEARANCES: Melvin M. Fillerup, Esq. of Cody, Wyoming, for appellant; Thomas C. Bogus, Esq., Field Solicitor, Cheyenne, Wyoming, for appellee.

OPINION BY MRS. LEWIS

Phil Hillberry has appealed from a decision of an Administrative Law Judge 1/ dated June 23, 1971, dismissing an appeal from a decision of a District Manager denying his requests for a readjudication of his grazing privileges to reflect the priority assertedly established by a predecessor in interest and to include the claimed grazing rights attached to a parcel of land known as the Benson place, purchased by a predecessor in 1956, and for partial reimbursement for a fence he constructed on public land in 1968 and 1969.

Appellant contends that the dismissal of his appeal from the decision of the District Manager was in error in that his seeking partial reimbursement for the fence he constructed from the adjoining allottee is not a dispute between two private parties, and that there is authority which should have been exercised to require that all parties who benefit by the fence pay for its construction and maintenance. Appellant also asserts error in the dismissal of his appeal from the denial of his request for the readjudication of his grazing privileges to reflect the priority established during the priority period from 1929 to 1934, and to include the grazing rights attached to the Benson property.

1/ The title of "Hearing Examiner" was changed to "Administrative Law Judge" pursuant to an order of the Civil Service Commission, 37 F.R. 16787, August 19, 1972.

In regard to the fence constructed by appellant on public land in 1968 and 1969, for which he seeks partial reimbursement, the record shows that at appellant's request a fence was constructed between the appellant's and the Webster Ranch Company's allotments. Pursuant to a cooperative agreement between the Webster Ranch Company, L U Sheep Company, Bureau of Land Management and Phil Hillberry, the BLM furnished the materials for that portion of the fence constructed in 1968 and appellant paid for the labor in the amount of $ 1,400. In accordance with the agreement, appellant furnished all the material and shared the labor costs with the Webster Ranch Company for that portion of the fence constructed in 1969. This agreement superseded an earlier agreement under which Webster Ranch was not required to pay anything. A supplementary agreement between the same parties provides that in the event Webster Ranch, within 20 years from completion of the fence, pastures unherded livestock against the fence, Webster Ranch will reimburse the Hillberry Cattle Company one-half the actual cost of that portion of the fence exposed to Webster's unherded livestock.

Appellant desires reimbursement for the fence from the Webster Ranch Company on an equal cost basis. The fence has been erected. Appellant was party to a contract covering payment for the fence by himself and by the Webster Ranch Company. This was appellant's opportunity to establish satisfactory terms for sharing the costs of the fence. No issue has been raised that there was failure to perform the contract. In these circumstances, appellant has only his remedy as a private party. Appellant's contention therefore is essentially a dispute, if any, between two private parties and neither the Administrative Law Judge nor this Board has authority to direct payment of compensation. Cf. Eldon L. Smith, 6 IBLA 166 (June 14, 19720; Eldon L. Smith, 6 IBLA 310 (July 12, 1972).

Appellant in 1960 acquired the bulk of his base property from his brother, who acquired it from their father, Henry G. Hillberry. In 1956, his father purchased a parcel of land known as the Benson place, which prior to purchase allegedly had 735 AUMs allocated to it. According to the adjudication of appellant's grazing privileges in 1964, appellant was allotted 183 AUMs on the Benson place.

Appellant's grazing privileges were adjudicated in 1964 establishing his base property qualifications, which he accepted by signing an agreement with the Bureau of Land Management specifying his grazing use. Tr. 43, 51. He applied for grazing use between 1964 and 1970 in accordance with the 1964 adjudication and was licensed accordingly.

Appellant is precluded from seeking to increase his base property qualifications by three sections of the grazing regulations. Under 43 CFR 4.470(b), formerly 43 CFR 1853.1(b), appellant lost his right to appeal through his failure to protest timely and appeal the District Manager's adjudicatory decision of 1964. Under 43 CFR 4115.2-1(e)(9) any base property qualification, which appellant might otherwise have, was lost by his filing applications in the years subsequent to 1964 for only those qualifications determined by the adjudicatory decision of 1964. The regulations at 43 CFR 4115.2-1(e)(13)(i) precludes appellant from now questioning the base property qualifications which have been recognized and license has issued for more than three consecutive years. In short, whatever remedies may have been available to appellant have dissolved with the passage of time and inaction.

For the stated reasons, Judge Dalby properly granted the Bureau's motion to dismiss appellant's appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis, Member

We concur:

Martin Ritvo, Member

Frederick Fishman, Member.